The Solicitors' Journal

Vol. 95 April 7, 1951 No. 14

CURRENT TOPICS

Marriage and Divorce

THE Royal Commission which has been promised as a consequence of the second reading of the Matrimonial Causes Bill is very much in people's minds. Both the ARCHBISHOP OF CANTERBURY and the ARCHBISHOP OF YORK said what it was their duty to say on the subject in their respective diocesan letters published last week. The former proposed that the marriage status should be restored rather than depressed by such palliatives as the Bill. The Archbishop of York said that the Bill was a long step towards divorce by consent. He hoped that the Royal Commission's terms of reference would be wide enough to enable it to consider the causes which have led to the large increase in divorce and the moral and social results which follow from it. The best contribution to the controversy of all that have been forthcoming for a long time past came from the pen of our own popular Mr. A. H. HASSARD SHORTT, if we may yield to the temptation of calling him so, in the *News of the World* of 1st April. After 35 years of splendid service as secretary of the Poor Persons' Divorce Department he retired from his post on 31st March. He left his work, he wrote, with no sense of disillusionment, and with no conviction that the institution of marriage was in real danger of destruction. Twice in a lifetime marriage had had to withstand the immense impact of world wars with their inevitable long separations and emotional upheavals. In many cases it was the hasty unions which finished on the rocks. Ruling out adultery and cruelty, one of the main causes of divorce to-day was the constant frustration felt by young married couples unable to find a home of their own, and those of whom the wife—through no fault of the husband—could not cope with the rising cost of living without going out to work. Mr. Hassard Shortt has handled hundreds of thousands of cases, and his vast experience and wise judgment should be available for any future investigation into the causes of and remedies for what is, at the best, a bad business.

Planning and Nuisance: Caravan Site

IN an article at p. 163, *ante*, it was suggested as improbable that, unless a particularly strong case existed, a local planning authority would take action under s. 26 of the Town and Country Planning Act, 1947, and that it was even more unlikely that the Minister would generally support such action. Our attention has now been called to an instance of a confirmed s. 26 order, so far as we know the first of its kind, initiated by the Gloucester County Borough Council. The council had been receiving complaints for many years about nuisances arising out of the use of a site on which congested, sub-standard living accommodation of all descriptions existed, including caravans, tents, old bus bodies, huts and the like. The owner of the site (who let off spaces to individuals) had no licence under s. 269 of the Public Health Act, 1936, and neither had the individuals. The corporation took the view that the operations and uses existing on the site constituted "development" for the purposes of s. 12 of the 1947 Act. As the development had, however, commenced before the

CONTENTS

" material date " for the purpose of the Town and Country Planning Act, 1932, s. 26 of the 1947 Act applied, and, having regard to subs. (1) of that section, the Gloucester County Borough Council made an order requiring the discontinuance of the uses and, additionally, the removal of those units of accommodation which were regarded as " buildings " for the purposes of s. 119. A local inquiry was held before an inspector of the Ministry of Town and Country Planning, an agreement with the Showmen's Guild as to the orderly rearrangement of part of the site for the benefit of Guild members only was reached and, in due course, the Minister confirmed the order. In this particular case the council take the view that s. 26 (7) of the 1947 Act does not apply, but they are nevertheless providing alternative accommodation elsewhere for permanent residents on the site. Moreover—and it is a matter of some importance—the owner of the land, not possessing a " land " licence under the Public Health Act, would appear not to be entitled to compensation under s. 27 (1) of the 1947 Act by reason of s. 2 (4) of the Acquisition of Land (Assessment of Compensation) Act, 1919. In any event, we are told he has informed the council, as local planning authority, that he does not intend to avail himself of s. 27.

Marriage and the Building Societies

THE ideals of temperance, thrift, and pride in ownership which motivated our great-grandfathers in founding the building societies are well known—and the volume of business transacted by the societies rightly and justly continues to increase. Equality as between the sexes was not, however, among these ideals, yet in recent months some societies have adopted policies which go some considerable way towards the aims of the Married Women's Association and " The Great Partnership." One society is insisting on joint conveyances and joint mortgages in all cases of sales to sitting tenants when husband and wife were in occupation of the premises before the sale, irrespective of whether the tenancy was a joint one. Other societies limit themselves to insisting on this course only when the preceding tenancy was joint. It would be interesting to know the degree of resistance to this policy which is met with from husbands. Certainly there will be litigation under the Married Women's Property Acts whenever unhappy matrimonial differences arise between the spouses. Looking on the brighter side, however, the societies' policy may help to stabilise marriages which would otherwise founder. Be that as it may, we feel that the societies are interested rather in simplifying their proceedings for possession against the occupiers in the event of unhappy *financial* difficulties arising.

The Lure of the Rent Tribunal

IT is reported that an American Air Force master-sergeant applied to the Twickenham Rent Tribunal on 27th March for the determination of what was the reasonable rent for a furnished flat at Hampton, consisting of a lounge, two bedrooms, a kitchenette and " two of the usual offices." He was charged a rent of £40 19s. a month. He said: " In our lounge is a coal fire, but you know about the coal shortage. The two bedrooms have gas, which we keep on most of the day. Back home we have central heating. Here I have to buy an oil stove. It costs me £3 10s. a month." He was asked why he took the flat if he could not afford it, and replied: " But I can afford it amply." The rent was reduced to £5 15s. 6d. a week. According to the *Daily Mail* of 28th March, which reported the case, the applicant commented: " This is great. I'm telling all the boys who come over to see the tribunal before they rent a flat." " The boys " will need further advice as to the preliminaries requisite in order to give the tribunals jurisdiction. The prospect of increased American visits may well hearten chairmen when business is slack. However, although the volume of such litigation may increase as a result of foreign visits, the promoters of the impending Festival need not fear the rent tribunal as a rival attraction, strong though its lure may be.

Professional Etiquette

A WELCOME innovation announced in the General Council of the Bar's annual statement for 1950 is that the Council's rules and rulings on professional conduct, which were reprinted in the Annual Practice, 1949, for the first time since 1941, are being revised and rearranged by the secretariat and are to be published separately in booklet form. Publication in the Annual Practice will then be discontinued. Their relegation hitherto to a few pages in a terrifyingly voluminous Annual Practice has meant that young counsel have in practice been deprived of the advantage of having at their elbow an ordered body of rules. When the official book of rules is published no young barrister will be heard to say that his error arose through ignorance of a little known point of etiquette, and no older barrister will be permitted to say that for his part he had to learn by his mistakes. A particular branch of the Council's rules of etiquette, of which, according to the statement, it is apparent that revision is necessary, is that relating to the activities in which non-practising barristers may engage. There is an increasing number of barristers in local government service, nationalised industries and statutory corporations on a full-time basis. A sub-committee of the Council's Executive Committee was set up in July, 1950, to examine the position and make recommendations. The work is still proceeding. There is also the question of part-time employment of barristers in local government service. For example, a practising barrister asked the Council whether he might take employment as part-time clerk to a local valuation panel under the Local Government Act, 1948. The Council replied that such employment would be contrary to the spirit of para. 41 (4) of the Consolidated Regulations of the Inns of Court.

Easter Law Sittings

THE number of causes in the list of the King's Bench Division for the Easter Law Sittings, which commenced on 3rd April, is 1,083, as compared with 1,215 for the corresponding term of last year. There are 688 long non-jury cases, 338 short non-juries, 45 jury actions, 4 short causes, 7 commercial cases, and 1 Revenue case. The Chancery Division figure is 120 as against 170 last year at the same time; 39 are in the non-witness list, 47 are witness actions and 10 cases are in the Revenue Paper Retained, and other matters number 24. There are 79 company matters which will be taken by Mr. Justice Vaisey. There are 7 appeals and motions in bankruptcy. There are 10 actions for hearing in Admiralty. In the Divisional Court there are 90 appeals, one of which is in the Special Paper, 4 are under the Acquisition of Land (Authorisation Procedure) Act, 1946, and 24 under the Pensions (Appeal Tribunals) Act, 1943. In the Court of Appeal there are 169 appeals (128 last year), of which 25 are from the Chancery Division, 87 are from the King's Bench Division, 9 are in Probate and Divorce, 2 in Admiralty, 1 from the County Palatine Court of Lancaster and 1 in the Appeal Tribunals List. In the Judicial Committee of the Privy Council there are 8 appeals, 2 of which are from Canada and 1 each from Ceylon, British Honduras, Hong Kong, Bermuda, West Africa and Singapore.

LIABILITY OF MINISTRY OF HEALTH FOR NEGLIGENCE OF HOSPITAL STAFFS

THE liability of the Ministry of Health for the negligence of hospitals' staffs was recently the subject of a most important decision by the Court of Appeal in *Cassidy* v. *Ministry of Health; Fahrni, Third Party* [1951] 1 All E.R. 574. The plaintiff, a general labourer, was early in 1948 suffering from a contraction of the third and fourth fingers of his left hand. He was seen at Walton Hospital, Liverpool, which was at that time owned and controlled by Liverpool Corporation, by a surgeon on whose qualifications and general competence no attack was made. The surgeon was a whole-time medical officer of the hospital, and had specialised in orthopædic surgery. He recommended and carried out an operation on the plaintiff's left hand, which involved in the ordinary course that the hand and lower arm were kept rigid in a splint for from eight to fourteen days. When the plaintiff's hand was finally released after some fourteen days, the condition of all four fingers was very bad and even after two manipulative operations the plaintiff was left with a hand which was completely useless to him. The plaintiff originally brought an action against Liverpool Corporation, but on 5th July, 1948, by virtue of s. 6 of the National Health Service Act, 1946, the hospital was transferred to the Ministry of Health, and accordingly the Ministry were properly substituted as defendants. The plaintiff alleged that he was negligently treated after an operation performed on his left hand by the surgeon in question. The Ministry, by their defence, denied negligence and denied responsibility for the professional skill of the surgeon, whom they brought in as a third party, and they also denied that the surgeon or any of their staff were negligent. The surgeon also denied negligence. Streatfeild, J., without deciding any other point, gave judgment for the Ministry on the ground that the plaintiff had failed to establish negligence on the part of the surgeon or of any other members of the hospital staff. On appeal, the Court of Appeal (Somervell, Singleton and Denning, L.JJ.) were clearly of opinion that there had been negligence, and the important question then arose as to whether the defendant Ministry were responsible.

Before answering the above question it is interesting to review some leading authorities bearing on the subject as indicating the remarkable misconception—not to say, confusion—which has existed in the past. The first case to which reference need be made is that of *Hillyer* v. *The Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820. The plaintiff entered St. Bartholomew's Hospital for the purpose of being medically examined under an anæsthetic. The examination was conducted by a consulting surgeon attached to the hospital. During the examination the inner upper part of the plaintiff's left arm was burnt by being in contact with a hot water tin projecting from beneath the operating table on which the plaintiff had been placed, and the inner upper part of his right arm was bruised by some person pressing against it during the operation. The various persons who took part in the examination of the plaintiff were two of the hospital staff, known as box carriers and attached to the operating theatre, who brought the plaintiff to the theatre and placed him upon the operating table, the surgeon who carried out the operation, assisted by two other surgeons, and the anæsthetist, a sister and two nurses who had to comply with the directions of the surgeons in charge. The plaintiff brought an action against the governors of the hospital for damages for injuries alleged to have been caused to him during the operation by the negligence of some members of the hospital staff. It was held by the Court of Appeal (Lord Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) that the action was not maintainable, on the following grounds: the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, in as much as they take their orders during that period from the operating surgeon alone and not from the hospital authorities. Farwell, L.J., in the course of his judgment, which was quoted for over thirty years in cases on this branch of the law, said (at pp. 825, 826): "The first question then is, were any of the persons present at the examination servants of the defendants? It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anæsthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendants . . . The only duty undertaken by the defendants is to use due care and skill in selecting their medical staff." Farwell, L.J., then went on (at p. 826) to discuss the position of the nurses, and of the carriers who brought the plaintiff to the theatre and placed him upon the operating table: "The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the servants of the defendants. But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders . . . The contract of the hospital is not to nurse during the operation, but to supply nurses and others, in whose selection they have taken due care. The relation of the hospital to the patient in respect of nurses and attendants supplied by the former for an operation on the latter is the same as that of the Association of Nurses to the patient supplied by them with a nurse."

The decision in *Hillyer's* case can scarcely be said to have given a clear lead on the vexed question of the liability of a hospital for the negligence of persons employed therein. As Lord Greene, M.R., said in *Gold* v. *Essex County Council* [1942] 2 K.B. 293, at p. 297: "*Hillyer's* case has had a remarkable history. There can be few cases in the books which have given rise to such a diversity of judicial statement as to the precise nature of the point decided." In *Gold* v. *Essex County Council, supra*, the plaintiff, a girl aged five years, was taken by her mother to Oldchurch County Hospital, which was maintained by the defendant county council under the Public Health Act, 1936,

for treatment for warts on her face. She was seen by the visiting dermatologist, who ordered treatment by Grenz rays and sent the plaintiff to the radiology department with a written statement as to the treatment she was to receive there. The department was in the charge of a radiologist, but the treatment was given to the plaintiff by a qualified and competent radiographer who was employed by the defendants under a contract of service. While the plaintiff was undergoing the treatment her face was covered with a lead-lined rubber cloth which protected all but the upper part of her face. This happened on about five occasions, but as the warts did not yield to this treatment the visiting dermatologist ordered the number of Grenz rays to be doubled, and the mother again took the plaintiff to the hospital for treatment. On this occasion the radiographer was admittedly negligent in that he covered the plaintiff's face only with a piece of lint. In doing this the radiographer was not acting under the instructions of the radiologist in charge of the department or any other qualified medical practitioner. As a result the plaintiff's face was permanently disfigured. The plaintiff brought an action by her next friend for damages, alleging that the radiographer had been negligent in his treatment of her and that the defendants, whose servant or agent he was, were responsible for his negligence. Tucker, J., felt himself bound by the decision in *Hillyer* v. *The Governors of St. Bartholomew's Hospital*, *supra*, and held that the defendants were not liable for the negligence of their radiographer, who was a competent and qualified man. But the Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.) reversed Tucker, J., and held that the defendants were liable for the negligence of their radiographer. Lord Greene, M.R., in the course of his judgment (at p. 302), summarised the position of the various people employed in a hospital in the following concise passage: "When a patient seeking free advice and treatment such as that given to the infant plaintiff knocks at the door of the defendants' hospital, what is he entitled to expect? He will find an organisation which comprises consulting physicians and surgeons, presumably the house physicians and surgeons, a staff of nurses, equipment for administering Grenz ray treatment and a radiographer, employed to give that treatment. So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the defendants preclude the drawing of an inference that the defendants undertake responsibility for their negligent acts. The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it. The position of the nurses again, although, no doubt, analogous, is not strictly relevant, but if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions, I cannot myself see any sufficient ground for saying that the defendants do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse. Nursing, it appears to me, is just what the patient is entitled to expect from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients . . . The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is not the essential work of nursing but only so-called administrative work appears to me, with all respect to those who have thought otherwise, not merely unworkable in practice but contrary to the plain sense of the position." And later, in an attempt to clear up any ambiguity which may have arisen as the result of the observations of Farwell, L.J., in *Hillyer's* case, *supra*, Lord Greene, M.R. (at p. 303), went on to say: "Even Farwell, L.J., in *Hillyer's* case does not say that the hospital does not undertake to nurse, but only that it does not undertake to nurse during the operation." Finally, dealing with the radiographer, who was primarily responsible for the negligent treatment of the infant plaintiff, Lord Greene, M.R., said (at p. 303): "In the case of the defendants' hospital, the patient seeking treatment by Grenz rays finds a department equipped with suitable apparatus and a whole-time employee engaged to give the treatment. In the circumstances I can draw no other inference than that the obligation assumed is to treat the patient by the hand of the radiographer with the apparatus provided."

It will be observed that in *Gold's* case, *supra*, Lord Greene, M.R., may have had in mind that some conceivable difference existed between consulting physicians and surgeons and house physicians and surgeons, but the learned Master of the Rolls expressly refrained from adumbrating that point any further. However, the point was clearly decided later by Hilbery, J., in *Collins* v. *Hertfordshire County Council* [1947] K.B. 598, where the learned judge held that the obligation undertaken by the owners and managers of the hospital to the patient was to be responsible for the acts of the resident junior house surgeon, but not for those of the visiting surgeon, since in the case of the resident junior house surgeon they had, and in the case of the visiting surgeon they had not, the power to direct him or her what to do and how to do it.

So much for past authorities on this subject, and while maintaining the greatest respect for the distinguished judges who decided the above cases, it can hardly be said that the lawyer or layman was left free from doubt as to the correct position. It is therefore all the more refreshing to return to the case which gave rise to our investigations, namely, *Cassidy* v. *Ministry of Health*, *supra*, where the Court of Appeal held that the defendant Ministry were liable for the injury to the plaintiff. Somervell, L.J., pointed out that it was not alleged that the operation itself had been negligently conducted. It was impossible on the evidence to come to any clear conclusion why the misfortune had happened. If, as he thought, the result was *prima facie* evidence of negligence at some stage, the defendants had failed to rebut that inference. The learned lord justice was of opinion that a hospital was liable for the negligence of both the permanent medical staff and the nursing staff. Denning, L.J., in dealing with the position of doctors and surgeons, expressed the view that the liability of a hospital for doctors on the permanent staff did not depend on whether there was a "contract of service" but that it depended on the answer to the question who employed the doctor or surgeon. Was it the patient or the hospital authorities? If the patient himself selected and employed the doctor or surgeon, as in *Hillyer's* case, *supra*, the hospital authorities were of course not liable for his negligence. But where the doctor or surgeon, were he a consultant or not, was employed and paid, not by the patient but by the hospital authorities, then Denning, L.J., was of opinion that those authorities were liable for his negligence in treating the patient. It did not depend upon whether the contract under which he was employed was a contract of service or a contract for services. That was a fine distinction which was sometimes of importance, but not in cases such as the present, where the hospital authorities were themselves under a duty to use care in treating the patient.

M.

"WITHOUT PREJUDICE"

THERE have been three recent cases which have thrown light on one aspect of the law relating to confidential communications. Strictly speaking, they should perhaps not be described as cases of privilege and they certainly do not extend the classes of persons to whom information can be given in confidence without fear of disclosure in subsequent court proceedings. In this respect the position of solicitors and counsel is unique. Communications made to them professionally cannot be disclosed by them except in the one case of communications made for the furtherance of a fraud or crime, but this privilege of a lawyer's client is very jealously restricted and disclosures made to clergymen and doctors have never been treated in the same way. There have been cases where the court has not thought it proper in a criminal matter to allow a clergyman to give evidence of confessions made by the accused, but clergymen, as such, certainly do not enjoy the same position as lawyers as regards privilege.

With regard to doctors the position is quite clear: they have no right to withhold from a court confidential information obtained from a patient, and in one case disclosure was enforced even when the statutory regulations applying to the scheme under which the doctor was treating the patient provided that absolute secrecy was to be maintained (*Garner* v. *Garner* (1920), 36 T.L.R. 196).

This lack of privacy in the confessional box or the doctor's consulting room has not been affected by the recent cases, and this is a real problem not only to those ancient professions but also to numerous new classes of advisers who have come into being as a result of the needs of our increasingly complex civilisation. Nowadays a great deal of confidential information is communicated to probation officers, advisers at Citizens' Advice Bureaux and marriage guidance counsellors, the success of whose work depends to a large extent on the conviction of those who consult them that any admissions they may make will not be disclosed. No such assurance can be given, however. If any of these advisers are subpœnæd to give evidence a plea of privilege will be unsuccessful, and their only hope is that the court may in a proper case decide not to compel a reluctant witness to give evidence by exercising its powers to commit for contempt of court.

In practice, however, the party wishing to take advantage of the admission will usually not know that the admission has been made unless it is made in his presence or communicated to him in the course of negotiations, and it is in these circumstances that the three cases referred to at the beginning of this article have shown that the fear of disclosure is not always well founded. Strictly speaking, these are not cases of privilege in the sense of a client being entitled to prohibit his legal adviser from giving evidence of what the client has said to him: they are cases of a party objecting to his admissions to the other party or to someone negotiating between the parties being given in evidence on the ground that such admissions were expressly or by implication made "without prejudice."

The first case referred to is *McTaggart* v. *McTaggart* [1949] L.J.R. 82 (C.A.). This was a divorce case which followed negotiations for a reconciliation assisted by a probation officer. The probation officer refused to give a statement to either party or to attend court until subpœnæd. There was a conflict of evidence between husband and wife, and the Divorce Commissioner reluctantly decided that he must admit the evidence of the probation officer. The Court of Appeal held that the evidence was properly admitted, but only because the parties had taken no objection to the evidence and must therefore be deemed to have waived their privilege. The reason why the negotiations were privileged was not because of any particular status of a probation officer but because the negotiations were deemed to have taken place "without prejudice."

The principle of "without prejudice" communications is familiar to lawyers and has been followed extensively in commercial circles. It has come into existence, as has been frequently explained, in order that parties may not subsequently be penalised for the frankness which they necessarily adopt when negotiating in an attempt to avoid litigation. We make no apology for repeating the lively description of the meaning of such negotiation which was quoted in an earlier article on this subject (see 92 SOL. J. 653):—

> "What I understand by negotiation without prejudice is this: plaintiff or defendant, a party litigant, may say to his opponent: 'Now you and I are likely to be engaged in severe warfare; if that warfare proceeds, you understand I shall take every advantage of you that the game of war permits; you must expect no mercy and I shall ask for none; but before bloodshed let us discuss the matters and let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms, and that nothing that each of us say shall ever be used against the other so as to interfere with our rights at war, if unfortunately war results'" (*per* Kekewich, J., in *Kurtz and Co.* v. *Spence & Sons* (1887), 58 L.T. 438, at p. 441).

Numerous decisions have confirmed the immunity of confidential communications, but the extent and limitations of the principle may not be so well understood. It does not apply at all to criminal proceedings. It applies only to negotiations when there is a dispute. Once the limitation that such negotiations are without prejudice has come into effect their immunity from disclosure extends even to disclosures not specifically stated to be without prejudice; the immunity may even apply to negotiations which took place before they were stated by either side to be without prejudice. It applies of course to negotiations between the parties to a dispute themselves as well as to cases where solicitors are acting, and besides protecting the client it protects admissions which might make the solicitor liable to a claim (*La Roche* v. *Armstrong* [1922] 1 K.B. 485). In spite of the privilege evidence may be given of the fact that negotiations took place, in order to explain delay, for instance, although not of the substance of the negotiations. If an offer made without prejudice is accepted evidence of the substance of the communication can be given.

All this has been established for a long time and *McTaggart* v. *McTaggart* only clarified the fact that communications may be deemed to be without prejudice even though this has not at any time been expressly stated. Denning, L.J., described the position in relation to the particular facts of this case as follows:—

> "It seems to me that negotiations which take place in the presence of a probation or other officer with a view to reconciliation are on the understanding, in the ordinary way, by all concerned, that they are to be without prejudice to the rights of the parties. The rule in other branches of the law applies with especial force to negotiations for reconciliation. It applies whenever the dispute has reached such dimensions that litigation is imminent. In all cases where the estrangement has reached the point where the parties consult a probation officer, that is the case. Then it is clear that there is a dispute which may end in either the police court or the Divorce Court."

In the next of the three cases now being considered (*Bostock* v. *Bostock* [1950] 1 All E.R. 25), doubt was thrown on the generality of the principle that "without prejudice" could be assumed. Here evidence was admitted in a divorce case of negotiations with a view to reconciliation which had previously taken place between the parties in the presence of their solicitors. It was held by the court of first instance that the decision in *McTaggart* v. *McTaggart* was due to the fact that the negotiations took place in the presence of a probation officer. Solicitors, as the probable inventors of the principle of negotiation without prejudice, might well feel aggrieved at a decision which made their position less confidential than that of probation officers, because although it might be said that a solicitor occupies a less impartial position than a probation officer, negotiations between the solicitors for the two parties are as sincere and as much in need of protection from disclosure as any other negotiations. The decision, however, must in any case be treated with great reserve, as Denning, L.J., subsequently stated that he did not accept its correctness.

This was in the third case, *Mole* v. *Mole* [1950] 2 All E.R. 328. Here a probation officer had been consulted by the wife with a view to reconciliation. He wrote to the husband and received a reply. It was argued on behalf of the husband that the decision in *McTaggart* v. *McTaggart* did not apply, because in the present case the husband had not accepted the probation officer as conciliator, and the commissioner admitted the husband's letter in evidence. The Court of Appeal held that this was wrong; in the circumstances in which the probation officer approached the husband the negotiations were to be deemed to be "without prejudice." Denning, L.J., took the opportunity in this case of making clear his view that the principle in *McTaggart* v. *McTaggart* "applies not only to probation officers but also to other persons, such as clergy, doctors or marriage guidance counsellors, to whom the parties resort with a view to reconciliation when there is a tacit understanding that the conversations are without prejudice," and also to solicitors.

As far as they go the decisions in *McTaggart* v. *McTaggart* and *Mole* v. *Mole* are perfectly clear. Further judgments may be needed, however, to show what the position is in rather different circumstances. Suppose, for instance, that in the case of *Mole* v. *Mole* the wife had made admissions to the probation officer and that the husband had not replied to a letter from the probation officer disclosing these admissions: in such a case there would be no "negotiations" in the full sense of the word but merely an approach from one side, ignored by the other, nor could anything in the situation be properly described as a "tacit understanding." Even so, it seems likely that the probation officer's letter would be deemed to be without prejudice. Take the case a little further, then. Suppose the letter from the probation officer had not disclosed the wife's admissions but the husband had learnt from other sources, perhaps from reckless statements of the wife herself, that these admissions had been made. What is there to prevent him from calling the probation officer to give evidence of what the wife had admitted to him? We have here moved out of the realm of "without prejudice" and are concerned with the principle of privilege in a stricter sense. The disclosure would, of course, be privileged if it had been made by the wife to her solicitor, but a probation officer, doctor, priest or marriage guidance counsellor has not the same position as a solicitor, and it is submitted that the probation officer would have to give evidence. Would have to give evidence, that is, if the court ordered him to do so and was prepared to commit him for contempt if he refused. Such a refusal is not impossible, for not only doctors and clergy but many of the increasing numbers of people who provide information and conciliation services feel very strongly their obligation to preserve patent impartiality and secrecy about the matters which are brought to them. So far, however, the courts have been reluctant to allow evidence to be withheld, as is shown by the case of *Garner* v. *Garner*, quoted above. It is true that in an earlier case (*Kitson* v. *Playfair* (1896), *The Times*, 28th March), Hawkins, J., said: "I can quite understand a case, especially in a civil cause, where a doctor is quite justified in refusing to divulge questions of professional secrecy.... The judge might in some cases refuse to commit a medical man for contempt in refusing to reveal confidences. Every case must be governed by particular circumstances, and the ruling of the judge will be the test."

There can be no question that the court has this power to take all the circumstances into account, but the factors are extremely difficult to weigh. On the one hand there are now large numbers of people who might claim the same weighty reasons for being allowed to withhold the confidences they have received; on the other there is a growing reliance by the public on non-lawyers for advice and assistance in the belief that their disclosures will be treated confidentially, and the courts will no doubt, on the grounds of public policy, do all they can to protect such confidences, particularly in the sphere of matrimonial reconciliation. In any event there is, of course, no obligation on a witness to give a statement in advance to either party to the proceedings, and the refusal to do so frequently deters legal advisers from recommending that a witness should be called.

R. E.

REPUDIATION AND PUBLIC BODIES

Out of the somewhat dingy facts of porterage of refuse down the Thames there has arisen in the recent case of *Cory (William) & Son, Ltd.* v. *London Corporation* (1950), 94 Sol. J. 552, of which a full report has appeared in [1951] 1 K.B. 8, two interesting points: the first on the nature of the act which amounts to repudiation and the other on the liability of a public body for the act of one branch affecting the contract of another. The matter is all the more interesting having regard to the rapid increase in the publicly owned trading corporations of a welfare state and the passing of the Crown Proceedings Act, 1947.

The defendants are responsible for the removal of refuse from the city and are also the port health authority exercising jurisdiction from Teddington Weir to the Nore Lightship, a stretch of the river whose banks are under the control of many different local authorities.

The plaintiffs transported the defendants' refuse down the Thames in their coal barges under a long-term contract, and in 1948 the port health authority caused byelaws to be sealed stipulating that from November, 1950, the carriage of refuse should be in barges of a substantially different type. The plaintiffs thereupon claimed that the passing of these byelaws by the defendants amounted to an immediate repudiation of what had become to the plaintiffs an extremely onerous contract and that they were thereupon entitled to treat it as at an end.

Apart from the interesting problem as to whether or not the contract was frustrated in November, 1950 (a point put

forward by the corporation at the hearing and not adverted to by the plaintiffs), the other aspects of the case were fully canvassed in the speeches of counsel.

Did the act of the port health authority become the act of the cleansing department so as to bind it? It was not suggested as a fact in the case that the committee in recommending this byelaw had in mind only the contract of their own corporation with the plaintiffs and desired to render it a nullity, so as to suggest malice. It was obvious that the effect of the byelaws was to be felt by many local authorities.

The trial judge, Lord Goddard, C.J., found that there was no question here that the corporation could be divided into two parts so that they were to be regarded *qua* sanitary authority as one body and *qua* port health authority as another.

It is therefore to the other aspect of the case, the meaning of repudiation, that one must look for the answer as to when a corporation, acting through its *alter ego*, can be said to have broken a contract with an outside party.

The defendants relied on the interesting case of *Board of Trade v. Temperley Shipping Company, Ltd.* (1927), 27 Ll.L. Rep. 230. The facts in that case were that a vessel that had been chartered by the Admiralty Commissioners broke down through lack of repairs to the engine. The owners had previously requested that repairs should be done that would have avoided this breakdown but a licence had been refused by the Board of Trade surveyor, acting under a statutory duty in a semi-judicial manner, on the mistaken belief that the original work was not of necessity. The owners claimed that the "cesser of hire" clause did not come into operation as the breakdown was due to the charterers and caused by the error of judgment of a fellow-servant of the Crown. Roche, J., found himself "utterly unable to imply in the charterparty a term or condition that the Crown should do nothing by virtue of some general legislation or by virtue of some executive action, entirely remote from the charterparty and done by persons not connected with the performance of the contract directly or indirectly, to bring about the results in question."

In the Court of Appeal, Scrutton, L.J., said: "I myself am not aware of any case . . . in which, where a defendant is sued for breach of contract or is sued on a contract and attempts to plead that he was prevented by the other party, that principle has been applied, unless the act of the other party was either an express or implied breach of the contract or a wrong—tort."

Lord Goddard, using the Oxford English Dictionary, found "to repudiate" defined as "to refuse to discharge or acknowledge a debt or other obligation." In his view repudiation must be a conscious act in relation to the contract in question.

The writer finds some difficulty in understanding the precise meaning of "conscious" here, for there are several ways of repudiating a contract in which the person's mind is not directed to the particular effects of his act, e.g., the effect of an act of bankruptcy on an executory contract (except one that a trustee can and will adopt). But Lord Goddard's train of thought is not difficult to follow, as he adopted the above-mentioned limits laid down by Scrutton, L.J., and required a wrongful act which may be either a breach of contract or the commission of a tort. However, one is rather left in the realm of speculation to see how a tort alone can amount to a repudiation.

Thus from the above it appears that the act of any branch of the executive, of either a judicial or legislative nature, done without malice, will be insufficient to amount to an incidental repudiation of contracts that it affects, either of that or other departments.

E. H. H. W.

Costs

APPEALS—IV

In our last article on this subject we considered in some detail the steps to be taken by the appellant in connection with an appeal to the Court of Appeal, and it will be useful to see whether, from that material, it is possible to give an estimate of the probable costs of such an appeal. Estimating, or rather forecasting, the costs likely to be incurred in a cause or matter is one of the less satisfactory and agreeable tasks that fall to the lot of solicitors.

The first step, we noticed, to be taken by the appellant's solicitor was to obtain instructions to appeal and to draw the notice of appeal, and have it settled by counsel, after which it would have to be copied for service on the respondent's solicitor and for lodging in the court. Thus far the matter is fairly straightforward and one appeal will differ very little from another in the matter of costs. Up to this stage, the probable costs would be about £15 to £20, including counsel's fees and court fees.

Leaving for the moment the matter of documents for the court, there is then the question of an application to the court by the respondent for security, which application will be attended by counsel. Apart from this there is then only the brief to counsel to attend the hearing of the appeal to be prepared and copied and the solicitor's attendance on counsel with the brief, and in conference, and his attendance in court on the appeal, followed by the drawing of the order of the Court of Appeal, and the serving of a copy thereof on the respondent, assuming that the appellant's solicitor takes up the order.

All this, in normal cases, does not amount to very much in the way of costs, for the brief is usually short since counsel will have all the facts in the former brief in the lower court, and it is not unreasonable, therefore, to say that the appellant's costs of an appeal, apart from the copy documents for the court and counsel, will not amount to much more than about £40, including counsel's fees for settling the notice of appeal, and the court fees. So far as the copy documents for counsel and the Court of Appeal are concerned, the cost of these must necessarily depend on their length and this will, of course, vary from case to case. However, we have seen that three copies of the relevant documents will be required for the court, whilst counsel will have his former brief and papers plus a copy of the judgment appealed from, and of the transcript of evidence, if any. Given the length of the documents, therefore, it will not be difficult to estimate rapidly the cost of copying them, for, including the authorised increase of 50 per cent., the documents for the court will cost 1s. 6d. per folio to copy whilst those for counsel will cost 6d. per folio. If, therefore, the relevant documents for use in the appeal amount to 200 folios in length, and the transcript of the judgment is 100 folios, then the cost of copying for the Court of Appeal will be 300 times 1s. 6d., or £22 10s., plus 100 times 6d., or £2 10s., a total of £25. The whole of the appellant's costs of the appeal, therefore, excluding counsel's brief fees, and assuming that the appeal will not last more than a day, will be about £65 or £70. As we observed in our last article counsel will normally be allowed the same

fees in the Court of Appeal as he received in the lower court, so that it will not be difficult to estimate the total costs that will be involved in an appeal.

It often happens that the client will ask what the solicitor's fees and expenses will be in the event of his appealing to the Court of Appeal and losing, and his solicitor should always remember to point out that in that event the client will not only have his own solicitor's fees and expenses to consider, but, since the costs almost always, with certain exceptions with which we have already dealt, follow the event, will also have to pay the taxed costs of the respondent on a party and party basis.

We will now consider what costs are likely to be incurred by a respondent in an appeal to the Court of Appeal. It will be obvious at once that they will be lighter than the costs of the appellant, since it is the latter who has to provide the court with copies of all the material documents. Apart from this aspect of the matter, there will be little difference between the costs of the appellant and the respondent, except for the court fees on setting down the appeal.

The first item in the respondent's solicitor's bill of costs will be "instructions to oppose appeal," for which a fee of 13s. 4d. is allowed. In passing it may be noticed that both here and also in respect of the appellant's solicitor's bill of costs, the fee of 13s. 4d. for "instructions" is intended to cover all the attendances and correspondence necessary to obtain client's instructions. It is totally inadequate in the majority of cases, but it is the maximum that will be allowed.

Following the obtaining of instructions to oppose the appeal, the respondent's solicitor will be allowed a fee of 6s. 8d. for attending on the shorthand writer and obtaining the transcript of the judgment in the court below, and will also be allowed the shorthand writer's charges for the transcript. The next step will be the application for security, in cases where security is merited. It will be remembered that in the first place the application should be made by letter to the appellant's solicitor, and, if security is refused, then application must be made to the court by motion, and for drawing the notice of motion a fee of 1s. per folio will be allowed. It is usual also to allow a fee to counsel to settle the notice of motion, but not more than one guinea is normally allowed. The motion will be supported by affidavit, and the usual allowances will be made for this and for filing and serving the appellant's solicitor with a notice that the affidavit has been filed.

A copy of the notice of motion is required to be set down, and a fee of 6s. 8d. is allowed for setting down the motion. Three copies of the notice of motion must be lodged in court for the use of the appeal judges, together with two copies of the affidavit in support, whilst a fee of 3s. 4d. is allowed for attending to bespeak the original affidavit off the file for the use of the court. The charge for attending to lodge the papers in the appeal court is 13s. 4d.

The usual fees are allowed for drawing and copying the brief for counsel, but it will be recalled that no fee is allowed for "instructions for brief." The normal fee allowed to counsel for attending on the motion is two or three guineas, whilst the solicitor is allowed a fee of one guinea for his attendance in court. After the hearing of the motion, and assuming that the application for security is granted, then the respondent's solicitor will draw the order, for which 6s. 8d. is allowed, with the usual charge for making a copy for the appellant's solicitor and serving it. The court fee on an interlocutory order is £1. When the order is drawn the respondent's solicitor will attend with the original order on the cause clerk to have the appeal marked "stayed." A fee of 6s. 8d. is allowed for this and a similar fee for attending on the appellant's solicitor and handing him the original order to enable him to pay the amount of security ordered into court. The original order will be returned in due course with the bank receipt endorsed thereon, but no further fee will be allowed for attending to receive the endorsed order.

That concludes the respondent's bill of costs, except for the preparation and copying of the brief to counsel and making copies of the necessary documents for his use, attending counsel with brief and in conference and attending on the hearing of the appeal. Again the brief fee allowed to the respondent's counsel on an appeal will be the same as he received in the lower court, except in unusual circumstances.

What then will be the probable amount of the respondent's costs of an appeal? Excluding, for the moment, the cost of copying the documents for counsel's use, the respondent's costs are confined to the instructions to oppose the appeal, the motion for security, and the brief to counsel. The solicitor's costs, counsel's fees and court fees in respect of these items will not, therefore, amount to very much in excess of £25, excluding counsel's brief fee on the appeal. To this must be added the cost of copying the documents for counsel's use and counsel's brief fee. In the example cited above the costs of copying for counsel amounted to £2 10s., so that in that case the respondent's solicitor's costs would probably not exceed £30, plus counsel's brief fees.

If, therefore, a client were to ask what it would cost him to take his case to the Court of Appeal, then the answer in the above example would be that in the event of the appeal being decided against him he would have to pay about £30 plus counsel's fees to the respondent's solicitor by way of costs, whilst his own solicitor's costs would be about £65 or £70 plus counsel's fees, assuming, as is usual, that the respondent is awarded the costs of the appeal.

Again, it may be that the client is the successful party in the action in the court below, and he may be anxious to know just how much he is likely to have to pay in the event of the other side appealing and succeeding in the Court of Appeal. So far as the costs of the appeal are concerned, the answer will be the same as the above, but—and this is a point that must not be overlooked—in the event of the appellant being successful in the Court of Appeal so that the judgment of the lower court is reversed, it will normally be reversed as regards the costs also, so that the unsuccessful respondent will have to pay not only the other side's costs of the appeal, but also the appellant's "party and party" costs in the court below, as well as his own solicitor's full "solicitor and client" bill of costs of the original action and of the appeal.

There is, of course, nothing to prevent the solicitor and his client coming to an agreement under s. 59 of the Solicitors Act, 1932, to limit the amount of the solicitor's costs to a specified sum, provided the agreement is reasonable, but this will still leave the costs of the other side in the lower court and in the Court of Appeal to be estimated. The problem of forecasting future costs is always a difficult one.

J. L. R. R.

Mr. C. R. Marshall, solicitor, of Doncaster, was Chairman of South Yorkshire's first R.A.F. "G" Reservists' Appeal Tribunal at Doncaster on 17th and 18th March.

Alderman J. B. Maudsley, solicitor, of Maidenhead, the present Mayor of the Borough, has been unanimously invited by the Council to hold office for another year, and has consented to do so.

A Conveyancer's Diary

UTILITY OF ATTORNMENT CLAUSES

THIS was the heading under which I discussed, a few months ago, the value of attornment clauses in a modern mortgage deed (see 94 SOL. J. 548). The immediate occasion of that article was the decision in *Portman Building Society* v. *Young* [1950] W.N. 372, where Danckwerts, J., held, in effect, that a tenancy created by an attornment clause fell within the protection of the Rent Acts. This decision created a good deal of alarm and despondency: it also produced a remarkable unanimity of opinion among those who write on real property matters, all of whom, so far as I can recall, expressed the view (which was no more than a reiteration of what was said by the learned judge himself in the course of his judgment) that the attornment clause had long since outgrown its utility and should no longer form part of a mortgage deed.

The decision of Danckwerts, J., in *Young's* case has now been reversed on appeal (see p. 61, *ante*), but I hope that this latest decision will not be regarded by those who settle mortgages (and particularly building society mortgages) as having reinstated the attornment clause in its old position of popularity with some draftsmen, and this for two reasons. Whether the tenancy created by an attornment clause is or is not within the ambit of the Rent Acts is immaterial to the wider question whether a mortgagee's security is in the slightest degree enhanced by the incorporation of a clause of this kind in the mortgage instrument, and on this latter question there can be no two opinions: it is not. And the decision of the Court of Appeal in *Young's* case is, with all respect to that tribunal, not quite so convincing when examined in print as it doubtless appeared when delivered orally in court. This decision, it may be noted, was not reserved.

The attornment clause in question was in the following form:—

> "The mortgagor hereby attorns tenant to the society of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the society may at any time without giving previous notice in that behalf determine the tenancy created by such attornment."

The amount of £9 16s. mentioned was the amount of the monthly instalments by which repayment was to be made. It does not appear from any report of the case which I have seen whether the mortgage was a mortgage by demise or a charge by way of legal mortgage. The latter is more common in this class of transaction, but in any case nothing, it would appear, turned on the precise form which the parties chose for their transaction.

The mortgagor fell into arrears with his payments and the building society took out a summons for possession in the High Court under R.S.C., Ord. 55, r. 5A, but the master objected that as the rent reserved by the attornment clause was more than two-thirds of the rateable value of the mortgaged dwelling-house, the Rent Acts applied to the tenancy created by the clause, with the result that although possession was granted to the society on the grounds of non-payment of the rent reserved by the clause, the society was not entitled to the costs of the application. This was the consequence of s. 17 (2) of the Rent, etc., Restrictions Act, 1920, which provides that the county court is to be the tribunal for dealing with all claims under that Act, and that if a person takes proceedings under that Act in the High Court which he could have taken in the county court, he is not to be entitled to recover any costs. Danckwerts, J., upheld the master's objection, and made an order for possession against the mortgagor but no order as to costs.

This is the decision which has now been reversed on appeal. The judgment of the Court of Appeal (Sir Raymond Evershed, M.R., Lord Radcliffe and Singleton, L.J.) was delivered by the Master of the Rolls, and may be summarised as follows:—

(1) Under the old law a mortgage commonly took the form of a conveyance of the fee simple, so that the mortgagee became the owner of the property. Under modern conveyancing practice the mortgagee does not become the legal owner: the mortgagor remains, at law as well as in equity, the owner of the property, subject only to the charge. But the Master of the Rolls did not pursue this aspect of the case further, as in his judgment there was another, and shorter, answer to the problem.

(2) The relationship, whatever it might be, created between the parties by the attornment clause was determinable at any time by the society. This contractual relationship, in so far as it partook of the character of a tenancy, had been determined by the issue of the summons, i.e., before the matter had come before the court.

(3) Where there has been a contractual tenancy within the scope of the Rent Acts and when that tenancy has come to an end, the policy of those Acts is to protect the occupant from eviction at the suit of the person who would be properly described as the landlord; but it was plain that the scheme of the Acts was to deal with premises of which the person in possession was, in a true and sensible meaning of the word, a tenant: the Acts applied to premises only if they were "let" as a separate dwelling.

(4) In the present case, once the contractual situation created by the attornment clause had gone, it was impossible with any sense of the meaning of words to refer to the relationship as that of landlord and tenant.

(5) There were other provisions of the Acts which protected mortgagors, and it was unnatural to suppose that cases in which the real relationship was that of mortgagee and mortgagor, but which were not within the protection of the parts of the Acts relating to mortgages, should by a side wind be brought under the protection of the other parts of the Acts which were not concerned with mortgages at all.

Leaving aside (1) as *obiter dicta*, the reasons given by the Master of the Rolls for this decision can, I think, not unfairly be summarised in a few words: the parts of the Rent Acts which protect tenants in the occupation of premises protect only real tenants, in the ordinary meaning of that word. This is the exact reverse of the view which Danckwerts, J., took. In the learned judge's view the parties had chosen for some reason, good or bad, to create the relationship of landlord and tenant between themselves, and had repeatedly used expressions which showed that a tenancy had been created and a rent was to be paid. Now, having regard to this divergence of view on a question which, with all respect to the Court of Appeal and the detailed reasons adduced for the view which it took, appears really to have been decided as a matter of impression, and to the fact that the case for the application of the Rent Acts to the attornment tenancy was not argued before the court, the mortgagor not having entered an

appearance, can one be completely satisfied that a tribunal more august even than the Court of Appeal would come to the same conclusion as that which has now been reached? It would be a bold man who would give a straightforward affirmative to this question.

Nor is an appeal on such a question unlikely. In the present case the only person who was interested to argue that the Rent Acts applied to the attornment tenancy was the mortgagor himself, and he was out of the running. But as I suggested in my article on the original decision in this case, one result of the application of the Rent Acts to an attornment tenancy may be the fixing of a standard rent for the premises, and appeals to the House of Lords on questions affecting the standard rent of premises are not unknown. I think, therefore, that, to put it no higher, there is something to be said in favour of the view that Danckwerts, J., took in this case, and that if this view were to be put before the House of Lords, the result would be unpredictable. In these circumstances there is only one thing, I think, to do with attornment clauses reserving anything more than a nominal rent—scrap them.

"A B C"

Landlord and Tenant Notebook

"OBLIGATION OF THE TENANCY"

THE law relating to rent control has so many unusual features that while some writers have, perhaps reluctantly, ceased to classify it as "emergency legislation," others, such as the editors of "Foa," prefer not to consider it part of the law of landlord and tenant at all. From time to time, however, we find courts, possibly unconsciously, applying principles of that law to situations created by the Rent Acts. I mentioned, when writing on "different kinds of orders for possession" in our issue of 6th January last (95 SOL. J. 7), that in the early days of this legislation, in *Reeks* v. *Shelley* (1920), 36 T.L.R. 868, Sankey, J., might be said to have been influenced by the law relating to relief against forfeiture when making a suspended order for possession of controlled premises. And it now looks as if the somewhat unexpected decision in *R.M.R. Housing Society, Ltd.* v. *Combs* [1951] 1 All E.R. 16; 95 SOL. J. 44 (C.A.) might set some of us brushing up on the much illustrated distinction between covenants which do and covenants which do not "run with the land."

The facts of the case were that in 1948 the plaintiffs let the defendant a house by an agreement which clearly stipulated that the tenancy was conditional on his being employed by and remaining employed by another party (who were "an associated company" of the grantor company). The facts that the letting was made in order to enable the tenant more conveniently and efficiently to perform the duties of his employment by that other company and that the letting was to be subject to such a condition were mentioned in a passage leading up to the words of demise, and the second paragraph contained the condition itself: "The tenancy is conditional on the tenant being and remaining in the said employment and it shall be *an obligation of the tenancy* on the part of the tenant that he shall be and remain so employed. Determination of such employment from any cause whatsoever shall terminate the tenancy." Obviously, the draftsman had in mind the provisions of the Rent, etc., Restrictions (Amendment) Act, 1933, s. 3 (1) (*a*) and Sched. I (*a*), entitling a court to make an order for possession if "any rent lawfully due from the tenant has not been paid, or any other *obligation of the tenancy* (whether under the contract of tenancy or under the principal Acts) so far as the obligation is consistent with the provisions of the principal Acts has been broken or not performed."

There was a further provision in the tenancy agreement by which either party could terminate it by two weeks' notice: "Provided always that upon the event of the conditions mentioned in para. 2 hereof ceasing to be satisfied the tenancy shall thereupon terminate automatically without the need for either party to give any notice to the other." In June, 1950, the tenant left the employment of the employer company at his own request in order to better himself, and as no mention is made in the report of any notice to quit having been given by either party or of any forfeiture notice having been served on the tenant it looks as if no one thought that the proviso was one to which the Law of Property Act, 1925, s. 146 (1), applied. I suggest that if the point had been taken the provision would have shared the fate of others which were, perhaps, designed to evade the law relating to forfeiture.

However, the action for possession was fought on the footing that the tenancy had become a so-called statutory one and at first instance the county court judge rejected an argument that the second paragraph of the agreement contained a condition or obligation which was inconsistent with the provisions of the Rent Acts. Not, it may be noted, that the obligation was not an obligation of the tenancy at all; but in the Court of Appeal, though counsel for the tenant duly contended (*a*) that the obligation to work for the other company was not an obligation of the tenancy but (*b*) that if it was, it was not an obligation which was consistent with the provisions of the principal Acts, the court, allowing the appeal, considered that "the sole question arose on the meaning of the words 'obligation of the tenancy'."

Singleton, L.J., had, before coming to that, reminded us that one cannot contract out of these Acts, citing a number of authorities which need not be referred to here: they included cases in which tenants had expressly agreed to give up possession (and one would like to know, incidentally, what ultimately happened to the £20 received by the defendant in *Barton* v. *Fincham* [1921] 2 K.B. 291, which she had not returned at the date of the hearing). Dealing with the "sole" question, then, Singleton, L.J., held that the condition was not an obligation of the tenancy because it did not arise out of the tenancy and did not relate to the subject-matter of the tenancy; it imposed an undertaking on the tenant, but that was not the same thing. Further, para. (*g*) of the Schedule would be unnecessary if the county court judge's interpretation were correct (para. (*g*) entitles the court to make an order when the house has been let in consequence of the employment *and* the landlord reasonably requires it for another employee. But cannot a house be let by an employer in consequence, etc., without the continued employment being made a condition of the tenancy?).

Evershed, M.R., likewise took the view that the obligation was not an obligation of the tenancy, considering that this must mean something binding on the tenant in his capacity as tenant as distinct from an obligation purely personal and collateral to the contract of tenancy. And the learned Master of the Rolls said that the matter might be usefully and legitimately tested by considering what the position

would be in the event of an assignment of the term during its contractual subsistence.

The last observation and Singleton, L.J.'s reference to obligations relating to the subject-matter of the tenancy strongly suggest that when considering whether or not the relevant part of para. (*a*) of the Schedule applies to a given set of facts reference may be made to the principle laid down in *Spencer's case* (1583), 5 Co. Rep. 16*a*, and now set out in the Law of Property Act, 1925, ss. 78 and 79. This principle is illustrated in, *inter alia*, *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410, though it concerned an assignment of the reversion rather than of the term; the obligation was imposed on the tenant of some land to grind his corn at the landlord's mill, and it was held that as long as both belonged to the same person that person could enforce it; and to *Mayho* v. *Buckhurst* (1617), Cro. Jac. 438, in which a covenant by a tenant of a twenty-one-year lease to pay the churchwardens of St. Saviour's, Southwark, a guinea a year was held, on appeal, to be unenforceable against an assignee of that term.

I described the new decision as unexpected because it has generally been considered that the object of the provision was essentially to exclude liability for such obligations as an obligation to deliver up possession at the expiration of the term. We are, as it were, reminded that before an obligation is to be characterised either as consistent with or not consistent with the provisions of the principal Acts it must be found to be an obligation of the tenancy.

The new authority does not give us clear and definite guidance on what the position would have been if the tenant had not been employed by a third party, but I think that the judgments point to a conclusion that the result would have been the same if he had been employed by the landlords themselves. For there would still have been two sets of obligations, one arising from the landlord-tenant and the other from the master-servant relationship; and the latter would have been unrelated to the subject-matter of, and collateral to, the former.

R. B.

PRACTICAL CONVEYANCING—XXXII

Stamps on Agreements

A READER has suggested that a note should be written on the question of the stamping of informal contracts, particularly those created by correspondence. The heads of charge in Sched. I to the Stamp Act, 1891, are brief and often do not define very clearly the circumstances in which duty is charged, but in this case there is some judicial authority. Consequently, it is possible to define the documents which need to be stamped, although it is not always easy to apply the rules to a particular transaction.

Two unusual cases are mentioned first in order that they shall not complicate further discussion. First, a contract for sale of an *equitable* interest in land, or of goodwill, is charged by the Stamp Act, 1891, s. 59, with *ad valorem* duty as if it were a conveyance. Secondly, an agreement for a lease for a term not exceeding thirty-five years, or for an indefinite term, is charged with the same duty as if it were an actual lease.

A contract under hand for the sale of a fee simple estate is chargeable with duty of sixpence (which may be denoted with an adhesive stamp: s. 22) under the head "Agreement or any memorandum of an agreement, made in England or Ireland under hand only . . . and not otherwise specifically charged with any duty, *whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument.*" The words in italics do not throw much light on the meaning of the words used earlier: "agreement or any memorandum of an agreement." It has been said that they are used merely to exclude the excuse that the agreement of which a memorandum is given in evidence need not have been made in writing because it did not fall within the Statute of Frauds.

The best explanation of the operation of the charge was given by Hawkins, J., in that favourite of our student days, *Carlill* v. *Carbolic Smoke Ball Co.* [1892] 2 Q.B. 484, in these words: "Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement, but if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement unless indeed after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered."

It follows that if an offer made by parol is accepted in writing, that writing requires a stamp, just as the written acceptance of a written offer must be stamped. On the other hand, a written offer accepted by word of mouth need not be stamped. Where a series of letters has led up to the formation of a contract by correspondence a letter constituting the acceptance of a firm offer is the letter to send for stamping. In this respect it is important to remember that the "acceptance" of an offer with variations must be treated as being itself an offer. Where some part of the negotiation has been by word of mouth one must analyse the offers and counter-offers to ascertain when a firm contract has been made and then apply the rules given above to decide whether a stamp is essential.

It may be, of course, that the contract has been made by word of mouth and written evidence has come into existence later. (If there is no written evidence the question of stamping cannot arise.) In *Beeching* v. *Westbrook* (1841), 8 M. & W. 411, it was stated that "A stamp is not imposed . . . upon every document which refers to and so furnishes evidence to prove an agreement; it is required only on documents in which the parties put down the terms by which they intend to be mutually bound." It would seem to follow that any document prepared with the intention of providing evidence of the contract must be stamped, but that there is no need to take this step if the document was brought into existence for some other purpose and merely incidentally provides evidence one party may wish to use. The need for a stamp arises if the parties intended that the document should be evidence of their agreement even if that document does not contain all the particulars needed to satisfy the Statute of Frauds or the Law of Property Act, 1925, s. 40.

J. G. S.

Alderman I. Y. Glynne, solicitor, Mayor of Bangor, has accepted an invitation to remain in office for another year.

Mr. Emyr Jones, solicitor to the Cardiff Corporation, was married on 29th March to Miss Mary Catherine Owen, of Denbigh.

HERE AND THERE

ADDENDUM

G. K. CHESTERTON was fond of recalling the paradox that a thing may be too large or too close to be seen. It is perfectly true, and I can plead only that in mitigation of an extraordinary oversight in my notes on the translation of Lord MacDermott from the office of Lord of Appeal to that of Lord Chief Justice of Northern Ireland. I forgot for the moment, and all the other commentators in the Press seem to have forgotten likewise, what a kind correspondent has recalled to me, that the present Lord Chief Justice of England did precisely the same thing. Having proceeded in due form through the degrees of Justice of the King's Bench and Lord Justice of the Court of Appeal, Sir Rayner Goddard became, on 19th July, 1944, Baron Goddard of Aldbourne, in Wiltshire. Then in 1946 he became Chief Justice. As in the case of Lord Russell of Killowen, his life peerage has not enlarged into a hereditary title so far, but then his children are three daughters. Lord Goddard is the son of a solicitor, Charles Goddard, a member of the firm of Peacock & Goddard, long established (before the bombardments) at No. 3 South Square, Gray's Inn. This little addendum gives me the occasion to correct an unarrested misprint which crept into my account of Andrews, J., in the same week. (Strange how a single letter changed can completely reverse the sense.) The manner of the learned judge was mild, not "wild."

EMPLOYMENT FOR LAW LORDS

LORD MACDERMOTT'S transition has, of course, started once again the delicious speculations (in which by a self-denying ordinance we are debarred from joining) as to who may be moved up to take his place. If, as some expected, the Northern Ireland Attorney-General, the Right Hon. Edmond Warnock, had gone up the repercussions would have spread less wide. It is, of course, just possible that no one will go up, for with the drying up of so many sources of Privy Council appeals there is a distinct possibility that sooner perhaps rather than later there will be a threat to the policy of full employment among the Law Lords, if their numbers are maintained at the level hitherto normal. For the moment there are enough Canadian appeals to keep the wheels turning —the Act abolishing the right of appeal from the courts of Canada did not affect cases already initiated. Beyond that one may say "further outlook unsettled." The case of the forty Chinese planes in Hong Kong is bound to come up whichever way the decision goes below. Neither the American interests in Civil Air Transport Inc. nor the Chinese Communist interests in Central Air Transport Corporation are likely to let themselves be shot down by a single adverse decision. Meanwhile Sir Walter Monckton, K.C., has taken timely seisin of the case and has gone out to Hong Kong to appear for the American organisation. Of course, if, as I was suggesting lately, the jurisdiction of the Judicial Committee were extended to correspond with that of its French counterpart, the Conseil d'Etat, there would be no fear for its future, but you may be quite sure that any attempt to set up a judicial body to control the present chartered lawlessness of the Executive would meet with every obstacle that the best brains in Whitehall could devise. Yet something will have to be done to check the growing disillusionment at the spectacle of the Rule of Law flying out of the window when the Man from the Ministry comes in at the door. The other day a distinguished leader was telling me that for every one case in his chambers relating to a High Court matter there are ten relating to cases before different administrative tribunals. Nor, he said, is it wonderful that it is so. Few people will set the most expensive machinery of the courts to work over a quarrel depending on a few hundred pounds. But by contrast some relatively obscure official is called on to decide matters on which a man's whole life or livelihood may turn. The citizen and his property are reduced to the level of so much raw material in the workshop of the administrative technician.

NO COMFORT

NOT this term, nor for many terms to come, are those responsible for the furnishing and maintenance of the Royal Courts of Justice likely to remedy those grounds of complaint to which Lord Webb-Johnson and others recently gave expression in the correspondence columns of *The Times*, forecasting a plague or outbreak of ischial callosities among those subjected to the physical discomforts of litigation. The law, it is true, is more addicted to hard facts and brass tacks than to sybaritic ease. "The Cushion of the Pleas" (long vanished with the court of which it was so potent an attraction), and that primitive sofa, the Woolsack, on which the Lord Chancellor still enjoys a not very exaggerated degree of luxury—these alone in our rough legal story suggest any concession to softening influences. There is the ring of Hearts of Oak in the old King's Bench, nor even off duty was it the instinct of the lawyers to relax. Let others take their ease in their inns; in the Inns of Court even the governing body were proud to proclaim themselves with a stern simplicity Benchers. The courts had sittings, never lollings or loungings. And, properly considered, this was not unwise. On the battlefield, the duelling ground and the boxing ring physical comfort is perhaps a secondary consideration, Now, litigation is a form of warfare. After all, it is a fight, and not a theatrical performance, and in that fight it is far more important that the advocates, the parties and the witnesses should be awake and alert than that they should be lulled and relaxed by comfort and well being. Thus, perhaps, there is a deep unconscious wisdom in the peculiarities of the High Court—the hard, narrow benches, which compel incomers or outgoers to scramble over the feet and knees of their neighbours, the sloping desks on which it is only by unremitting vigilance that papers can be maintained lest they collapse in a heap on the floor. These things make for wakefulness all round. So do the loudly clapping swing doors and the innumerable concealed steps down which the unwary tumble with a crash. Perhaps there is a transcendent wisdom in all this. Perhaps.

RICHARD ROE.

SOCIETIES

The annual dinner of the WORTHING LAW SOCIETY took place at Warnes Hotel, Worthing, on 16th March and was attended by nearly 200 members and guests. The official guests included the Mayor of Worthing, Alderman C. Stanley Green, J.P., Sir Roland Burrows, K.C., LL.D., Sir Reginald Sharpe, K.C., Brigadier O. L. Prior-Palmer, D.S.O., M.P., and Mr. T. G. Lund, C.B.E., the Secretary of The Law Society. The toast of the "Worthing Law Society" was proposed by Mr. Lund and replied to by the President Mr. F. R. Edis. Mr. Warren E. Lovesy proposed the toast "The Bench and the Bar" to which Mr. Anthony Harmsworth responded and the toast "The Guests" was proposed by Mr. E. G. Townsend, O.B.E., the Town Clerk of Worthing, to which the Mayor replied.

THE UNION SOCIETY OF LONDON (meetings in the Common Room, Gray's Inn, at 8.0 p.m.) announces the following subjects for debate in April, 1951: Wednesday, 11th April, "That divorce is too difficult"; Wednesday, 18th April, "That the Government should go to the country now."

At the annual dinner of the PRESTON LAW DEBATING SOCIETY on 29th March, Lord Justice Singleton was the principal guest.

REVIEWS

Dymond's Death Duties. Eleventh Edition. By R. DYMOND, Solicitor, formerly Deputy Controller of the Estate Duty Office, and R. K. JOHNS, LL.B. (Lond.), of the Estate Duty Office. London: The Solicitors' Law Stationery Society, Ltd. 1951. £3 15s. net.

Dymond is the book from which most of us learnt our death duty law, and it is one of the few books which (along with the Annual Practices and Conveyancing Precedents) is indispensable in every solicitor's office. This new edition has been awaited for some time (the last was published in 1946) and brings with it some welcome surprises.

First of all, the format is greatly changed. The last two editions, owing to war-time difficulties, were of forbidding appearance and the close print was difficult to read. The new edition is beautifully printed, attractively but solidly bound, and has a flexible back which allows it to lie open easily. The publishers are to be congratulated on a volume which, from a production point of view, is far ahead of most current text-books and well worth the increased price.

In substance the old and well-tried text has been retained, though it has been rearranged and split up into shorter chapters, which make quick reference easier. The authors have rightly omitted a lengthy discussion of legacy and succession duty (for which the last edition should be retained), but have explained in detail, with illustrations, the circumstances in which repayment can be claimed where, before the Act of 1949, these duties were paid on settled capital. The treatment of estate duty is comprehensive, and has been expanded in many places. All legislation and case law to the end of 1950 has been incorporated—even the recent unreported case of *Re Peyton* on pension schemes.

Features which deserve particular mention for their high quality include the valuation of shares in private companies (pp. 236 *et seq.*) and of "slices" of settled property (pp. 268 *et seq.*); the ultimate incidence of duty (Chap. XVII); and foreign assets and double duty arrangements (Chaps. XXI and XXII). But the whole book is complete, reliable and full of explanatory illustrations. The relevant statutes are set out at length in the Appendices, which also include an outline of duties in the U.S.A., Canada and South Africa. There is a good index.

One or two words may be added by way of constructive criticism. The repellent and horribly complicated subject of duty on the assets of controlled companies—perhaps the most difficult branch of the whole of English law—is explained in Chap. XII. No one has yet succeeded—and probably no one ever will—in explaining s. 46 of the Finance Act, 1940, and its amendments and ramifications, in a way which is at once lucid and exhaustive. The authors have certainly been exhaustive, and have explained the details with great care, calling in aid decided cases on allied topics of sur-tax law; they have also added some numerical illustrations (as in former editions) which are of great assistance. However, it would be helpful to have a longer preliminary section giving a bird's-eye view, in general terms, of the operation of s. 46, and, most important—if the Estate Duty Office would allow it—some broad indication of the official policy in applying the charge under this section.

Two further points on which the treatment might be amplified are the subject of "funds derived" from the deceased (pp. 159–160) and the official practice regarding pension funds (pp. 161–162).

These points should be borne in mind when a supplement falls due, but in no way detract from the uniform excellence of a valuable text-book.

The extensive revision is mainly the work of Mr. Johns.

Joint Torts and Contributory Negligence. By GLANVILLE L. WILLIAMS, LL.D. (Cantab.), Quain Professor of Jurisprudence in the University of London, of the Middle Temple, Barrister-at-Law. 1951. London: Stevens and Sons, Ltd. £3 3s. net.

This is a work of academic scholarship, which subjects to a microscopic analysis two special branches of the law of torts. Therefore, while it will find its place in law libraries, both here and overseas, it is unlikely to appeal to practising lawyers, except the few who like to read an occasional discussion of principle.

As an academic discussion, the book is interesting, and pleasantly written with a touch of colour in the style. It is also stimulating, even though more often than not it stimulates to dissent. In the opinion of the present reviewer, much of the reasoning is weak—for instance in comparing contributory negligence with failure to mitigate damages, analogy is mistaken for identity. The author starts unnecessary hares about the effect of familiar cases like *Smith* v. *Baker* (pp. 299–301) and *Indermaur* v. *Dames* (pp. 319–321): and often reads into cases problems which did not arise (e.g. *Cakebread* v. *Hopping*—p. 275). Again, there is a marked tendency to fit case-law to theories and to "rationalise" on grounds not discussed in the judgments; and—conversely—to pay undue attention to the wording of unreserved judgments of first instance, as if every word were a deliberate expression of some consciously-held theory.

Much could be said about the author's views on causation in negligence cases and on the "last opportunity" rule, which lead him at various stages to criticise four of our greatest judges—Viscount Simon, Lord Atkin, Lord Wright, Lord du Parcq. In this short space only one comment can be made: viz. that the discussion would be improved by distinguishing between the effect of an *omission* (e.g. failure to fence) in contrast to a positive act.

It would facilitate reference in the index and table of cases if *pages* were quoted, instead of paragraphs.

In conclusion, a valuable feature of the book is the incorporation of a mass of helpful case-law from the U.S.A. and various parts of the Empire.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

The Art of Drafting

Sir,—I have just read the letter of R. B. in your issue of 31st March.

In my reply to his article (90 SOL. J. 438) I said, and now repeat, that "in a long experience I have found the layman understands the meaning of the word 'covenant' quite as well as the lawyer does." Certainly I have never read or heard of such a case as that referred to by R. B. where (quoting his words) "its use has had the unfortunate effect of deterring people from reading what are, essentially, conveyances binding on them."

A few more words now, if I may, by way of conclusion to my letter of the 10th March on the article written by "A B C." I refer to the phrases or words in that article upon which he animadverts. I am, indeed, surprised to read and learn from his strictures that lawyers' phrases such as "aforesaid," "the said," "hereinbefore," "thereto," and so on, very often appear so barbarous to a "well-educated layman." Surely, as their dictionary recognition shows, they are used by lawyers in the legal sense, and, as I submit, obviously with the view to avoid in many instances repetition in full of something already written. In my view the student should be taught by a master of this special branch of our profession—one who has reference to the last editions of standard books of precedents. A good conveyancer is one with an aptitude for composing or writing in an original sense, and then (without slavishly following common form) his legal training and experience will enable him to phrase his drafts suitably and safely for the subject-matter in hand and all its attendant circumstances. Spare me your "thorough-going modernists." After all, why fuss over trifles? Thus thinking, I recall to mind, and invoke, the lawyers' guiding maxim: "*De minimis non curat lex.*"

H. F. CAIN.

Hove, 4.

SURVEY OF THE WEEK

HOUSE OF LORDS

DEBATE

The MARQUESS OF READING rose to draw attention to the Government's conclusions on the Reports of the Pilcher and Lewis Committees on **Courts Martial Procedure and the Administration of Justice in the Armed Forces.** Since 1939 great numbers of men had been conscripted into the Armed Forces by statute and hence questions of this kind now had a new and more important aspect and a wider application than formerly. After commenting on the very long delays by the Government in implementing these reports, Lord Reading congratulated the Government on its decision to set up a courts martial court of appeal.

With regard to recent courts martial he hoped the Government would take steps to secure that the rules of contempt of court applied equally without any possibility of doubt to courts martial and to civil courts. Those who had practised at the Bar or in other spheres knew how ill-advised it was to arrive at a conclusion without having in front of one a full and accurate report of the facts. In a recent case in Korea, it was impossible for Fleet Street to have had, on the day sentence was passed, a complete verbatim record of the proceedings, yet it had broken forth into unbridled criticism.

He was glad the Government had decided to separate the two functions formerly exercised by the Judge Advocate General, of prosecuting offences and of subsequent review and tendering advice to the heads of departments as the proceedings continued or when they had come to an end. Though he had no doubt the system had worked quite fairly it had allowed the possibility of a misconception in people's minds. He was also glad that the recommendation of the Lewis Report that a finding of " guilty " should be unanimous had been rejected. A court martial was not a jury, but more analogous to a bench of magistrates, where, of course, the majority view always prevailed.

Mr. Raymond Blackburn's suggestion of including on the court martial a soldier of the same rank as the accused was not possible because the Forces had to maintain a certain standard of discipline. Lord Reading regretted that the recommendation that " summaries of evidence " prepared before trial should always be on oath and that the accused should be present and should be represented had not been accepted. It was not at all easy for officers with no legal training to conduct a summary of evidence on which much of the decision of the actual court might depend.

As regards naval courts martial friends of his at the Bar who had appeared before such courts had been startled at the archaic procedure whereby leave of the President of the Court had to be obtained before a witness could be examined or cross-examined. Again, in these courts the judge advocate had been in the habit of retiring with the court when they considered their findings. The accused and his advisers thus had no information of any kind as to the counsel given in secret by the judge advocate to the members of the court whilst they were considering their findings. This clearly infringed the principles of justice as they would be understood in a civil court. A third matter which he felt required attention was the practice of circulating before the trial a document known as the " circumstantial letter " which purported to set out the facts to the president and the members of the court. Not once but often members of a naval court martial had been shown to have considered statements in the circumstantial letter to be more conclusive than the evidence at the trial.

VISCOUNT HALL said the Lewis Committee's recommendation of legal aid had been put into effect in all three services. In the year ended February, 1951, 62 per cent. of applications for legal aid before courts martial had been granted. No decision had yet been reached on the question of " summaries of evidence." It had been agreed that the Judge Advocate General should in future be appointed by the Lord Chancellor. LORD WINSTER hoped that in all cases of a very grave character a judge advocate chosen from King's Counsel or from among experienced barristers would be appointed.

Replying to the debate, the LORD CHANCELLOR said if he were innocent of a charge he would not much mind whether he were tried by court martial or by judge and jury. If he were guilty he would much prefer a court martial. Although as a law officer he had sometimes found matters of form to criticise which would perhaps shock lawyers, he thought he could say he had never found a case in which he considered that a court martial had reached a wrong conclusion as regards guilt or innocence. He was glad Lord Reading had raised the various matters and they could be more fully dealt with when the new Bill came before the House. [14th March.

STATUTORY INSTRUMENTS

Act of Sederunt (Rules of Court Amendment), 1951. (S.I. 1951 No. 505 (S. 20).)

Act of Sederunt (Sheriff Court Rules Amendment), 1951. (S.I. 1951 No. 504 (S. 19).)

Agricultural Lime (Amendment) Scheme, 1951. (S.I. 1951 No. 513.)

Barley (Amendment) Order, 1951. (S.I. 1951 No. 495.)

Calne and Chippenham Rural Water Order, 1951. (S.I. 1951 No. 483.)

Commonwealth Telegraphs Act, 1949, Amendment Regulations, 1951. (S.I. 1951 No. 481.)

Dredge Corn (Great Britain and Northern Ireland) (Amendment) Order, 1951. (S.I. 1951 No. 497.)

Dried Fruits (General Licence) Order, 1951. (S.I. 1951 No. 516.)

Encouragement of Exports (Leather, Footwear and Allied Products) (Revocation) Order, 1951. (S.I. 1951 No. 463.)

Exchange Control (Payments) (French Franc Area) Order, 1951. (S.I. 1951 No. 458.)

Exchange Control (Payments) (Italian Monetary Area) Order, 1951. (S.I. 1951 No. 471.)

Fats, Cheese and Tea (Rationing) (Amendment No. 2) Order, 1951.(S.I. 1951 No. 470.)

Gas (Conversion Date) (No. 27) Order, 1951. (S.I. 1951 No. 490.)

Hill Sheep Subsidy Payment (Scotland) Order, 1951. (S.I. 1951 No. 489 (S. 17).)

Imported Carpets (Maximum Prices) Order, 1951. (S.I. 1951 No. 448.)

Labelling of Food (Amendment) Order, 1951. (S.I. 1951 No. 462.)

Legal Aid (Scotland) (General) (No. 2) Regulations, 1951. (S.I. 1951 No. 503 (S. 18).)

Local Authorities and Local Education Authorities (Allocation of Functions) Regulations, 1951. (S.I. 1951 No. 472.)

Local Government (Grants and Payments) (Alterations of Boundaries, etc.) Regulations, 1951. (S.I. 1951 No. 514.)

Made-up Textiles Wages Council (Great Britain) Wages Regulation Order, 1951. (S.I. 1951 No. 488.)

Monopolies and Restrictive Practices (Dental Goods) Order, 1951. (S.I. 1951 No. 516.)

National Health Service (General Medical and Pharmaceutical Services) Amendment Regulations, 1951. (S.I. 1951 No. 479.)

National Health Service (Local Health Authorities) Estimation of Expenditure (Amendment) Regulations, 1951. (S.I. 1951 No. 482.)

National Health Service (Travelling Allowances, etc.) Amendment Regulations, 1951. (S.I. 1951 No. 507.)

Nurses (Area Nurse-Training Committees) Order, 1951. (S.I. 1951 No. 478.)

Oats (Great Britain and Northern Ireland) (Amendment) Order, 1951. (S.I. 1951 No. 496.)

Patents (Extension of Time) (Federal Republic of Germany) Rules, 1951. (S.I. 1951 No. 457.)

Police (Overseas Service) (Malaya) Regulations, 1951. (S.I. 1951 No. 484.)

Purchase Tax (No. 4) Order, 1951. (S.I. 1951 No. 459.)

Remuneration of Teachers Order, 1951. (S.I. 1951 No. 450.)

Remuneration of Teachers (Farm Institutes) Order, 1951. (S.I. 1951 No. 510.)

Representation of the People (Adaptation of Enactments) (Scotland) Order, 1951. (S.I. 1951 No. 506 (S. 21).)

Retention of Cable and Pipes under Highway (Buckinghamshire) (No. 1) Order, 1951. (S.I. 1951 No. 467.)

Retention of Cables, Main and Pipes under and over Highways (Durham) (No. 1) Order, 1951. (S.I. 1951 No. 468.)

Safeguarding of Industries (Exemption) (No. 3) Order, 1951. (S.I. 1951 No. 493.)

Stopping up of Highways (Gloucestershire) (No. 2) Order, 1951. (S.I. 1951 No. 473.)

Stopping up of Highways (Gloucestershire) (No. 3) Order, 1951. (S.I. 1951 No. 466.)

Stopping up of Highways (Hampshire) (No. 1) Order, 1951. (S.I. 1951 No. 435.)

Stopping up of Highways (London) (No. 7) Order, 1951. (S.I. 1951 No. 475.)
Stopping up of Highways (London) (No. 8) Order, 1951. (S.I. 1951 No. 437.)
Stopping up of Highways (Morayshire) (No. 1) Order, 1951. (S.I. 1951 No. 477.)
Stopping up of Highways (Northamptonshire) (No. 1) Order, 1951. (S.I. 1951 No. 465.)
Stopping up of Highways (Staffordshire) (No. 1) Order, 1951. (S.I. 1951 No. 476.)
Stopping up of Highways (West Riding of Yorkshire) (No. 3) Order, 1951. (S.I. 1951 No. 438.)
Stopping up of Highways (Wiltshire) (No. 4) Order, 1951. (S.I. 1951 No. 474.)
Sugar (Rationing) (No. 2) (Amendment) Order, 1951. (S.I. 1951 No. 461.)
Teachers' Salaries (Scotland) Regulations, 1951. (S.I. 1951 No. 460 (S. 16).)
Theatre Tickets and Messengers Company Warrant, 1951. (S.I. 1951 No. 502.)
Utility Apparel (Maximum Prices and Charges) (Amendment No. 2) Order, 1951. (S.I. 1951 No. 413.)
Veneer (Birch and Maple) Prices (Revocation) Order, 1951. (S.I. 1951 No. 511.)

NON-PARLIAMENTARY PUBLICATIONS

Command Paper 8186, 1951 : Civil Judicial Statistics

Total proceedings in the High Court for the year 1949 showed an increase of 10 per cent. over the preceding year, from 130,776 to 144,846 ; whereas the total number of matrimonial petitions, 35,433, decreased by 2,724. Of 137 applications to be allowed to present a petition for divorce within three years of marriage 102 were successful. There was a 10 per cent. increase in proceedings commenced in the county court, from 409,222 to 451,864. Eighty-five per cent. of these cases were determined before a judge, the rest before a registrar.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 88-90 Chancery Lane, W.C.2, and contain the name and address of the subscriber, and a stamped addressed envelope.

Trust for Sale—Partition of Real Estate among Remaindermen

Q. A testator died in 1933 leaving a widow and three daughters who are all of age. By his will he devised his real and personal estate to trustees upon trust for sale, to invest the proceeds and to pay the income to his widow during her life ; after her death the proceeds are to go to the daughters in unequal shares. The will contains a power to postpone sale and a direction that the income of the unsold part shall be applied as if it were income of the proceeds. The widow and daughters wish to put an end to the trust for sale and to partition the real estate amongst the daughters. Can this be done by the trustees under s. 28 (3) of the Law of Property Act, 1925 ? In other words, does the expression " absolutely vested " in that subsection mean " vested in possession," or is it satisfied where, as in this case, the net proceeds are vested in reversion ?

A. Taken by itself, s. 28 (3) of the Law of Property Act, 1925, appears to contemplate that the undivided shares in the proceeds of sale may be vested in reversion only. This seems to us to follow from the words that the trustees may " with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale " partition. Exclusion of " annuitants " would seem, by implication, to mean that life tenants were not excluded and that, with their consent, the land could be partitioned. Doubt is, however, thrown on this construction of the subsection by the decision of Farwell, J., in *Re Thomas* [1930] 1 Ch. 194, where it was held that the subsistence of a life tenancy in one-quarter of the proceeds of sale made it impossible to say that the net proceeds of sale had under the trusts affecting the same " become absolutely vested in persons of full age in undivided shares." In deference to this decision we accordingly consider that the widow must surrender her life interest (by sale or otherwise) and thus accelerate the interests in remainder before partition can be effected.

Assignment of Head Lease to Underlessee—Unpaid Arrears of Rent

Q. Our client was the underlessee of certain premises and she contracted to buy the head leasehold interest. A contract in the form of the National Conditions of Sale (15th ed.) between her and the head lessees was duly completed. The head lessees by a deed of assignment as " beneficial owners " assigned unto her the premises comprised in the head lease, the concluding words of the parcels clause being " and subject also to but with the benefit of the underlease." This is the only reference to the underlease in the deed except for a recital to the effect that the underlease was then vested in the purchaser, our client. Some weeks after the completion of this purchase the head lessees claimed that there were unpaid arrears of rent due under the underlease from our client in respect of a period prior to the assignment to our client. Having regard to the provisions of s. 141 of the Law of Property Act, 1925, to the wording of the deed of assignment and to the presumed merger of the underlease with the head lease, are the head lessees now in a position to maintain this claim against our client ? We might mention that the head lessees were not, in fact, the original head lessees but assignees of the head lease.

A. If the underlease contains a separate personal covenant for the payment of rent, this survives the assignment of the head term and consequent merger of the sub-term. Accordingly, the purchaser remains liable to pay the arrears of rent which accrued before the assignment (*A.-G.* v. *Cox* (1850), 3 H.L. Cas. 240). Even if there was no covenant, the purchaser would be liable to make an equivalent payment for use and occupation during the period (*Shaw* v. *Lomas* (1888), 59 L.T. 477).

Estate Duty—Gifts under Seven-Year Deeds of Covenant

Q. A for several years has been in the habit of making pecuniary gifts of about £50 per annum to certain friends in poor circumstances. Her sur-tax rate being 7s. 6d. in the £, it was pointed out to her that she could make more substantial gifts, with little or no extra expense to herself, by entering into seven-year deeds of covenant, in the usual form, to pay annual sums during the joint lives of herself and the donees or the seven years (whichever is the shorter period), and this she has done. The sums payable under the deeds vary between £120 per annum and £240 per annum. A has asked to be advised whether, if she makes further voluntary gifts to the same donees not exceeding £500 each and dies within five years of the date of such gifts, the payments received by the donees under the deeds of covenant within five years of her death would have to be added to the suggested payments of £500 and the total treated as a gift *inter vivos* which would be liable to estate duty on A's death.

A. It is considered that, when the facts are disclosed to the Estate Duty Office, a claim for duty will be made and that such claim is likely to succeed. Even if technically annuity payments are not voluntary to the extent that they are made pursuant to a binding obligation, it must be remembered that the obligation was voluntarily undertaken. For estate duty purposes there is certainly no doubt that in the event of death within five years of the date of the deed of covenant the payments made under the deed have to be brought into account—the only question is whether the position is different if the death occurs after the five-year period. In the first case, whether the voluntary disposition is treated as the deed of covenant or as the payments made under it, the position is the same—in the second case it is by no means the same. In our view the yearly payments themselves have to be brought into account and therefore it does not matter whether the death occurs within or without the five-year period. It is considered that liability to estate duty as suggested would arise.

Compulsory Acquisition—Whether Executors Bound by Valuation for Probate

Q. We act for the executors of A, deceased. A owned certain freehold properties in London which were war damaged, and an application was recently made for permission to reinstate such war damage. The London County Council have agreed

that the works of reinstatement proposed do not constitute development within the meaning of the Town and Country Planning Act, 1947, but, in view of the fact that the metropolitan borough council propose compulsorily to acquire the premises for housing purposes, it is not possible for our clients to proceed with such works. A valuation of the premises for probate purposes was made prior to the admission by the London County Council that the proposed works do not constitute development, and the question of revaluation, having regard to the proposed compulsory acquisition, has now arisen. Will the executors be bound by the figure at which the properties were valued for probate purposes in any negotiations which may take place in connection with the compulsory acquisition of the properties ?

A. The proviso to r. 2 in s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, *entitles* the arbitrator, now the Lands Tribunal, *to consider* all returns and assessments of capital value for taxation made or acquiesced in by the claimant. The executors will not be *bound* by the figure in the valuation for probate, but it is clearly of importance as evidence of the opinion of the executors as to the value of the property at the date to which the valuation relates. It appears from the inquiry that the valuation was made on a wrong basis and, if this could be shown to the satisfaction of the tribunal, no doubt the tribunal would accept the explanation. If the claim against the metropolitan borough council is made by a beneficiary or devisee and not by the executors, it may be that the probate valuation would not be a valuation made or acquiesced in by the claimant for the purposes of r. 2 (see Cripps on Compulsory Acquisition of Land, 9th ed., p. 424).

NOTE.—The provisions of s. 1 of the Town and Country Planning (Amendment) Act, 1951, may have the effect of reversing the decision of the L.C.C., though the value of the property is unlikely to be affected by the reversal owing to the provisions of subs. (2) of this section.

NOTES AND NEWS

Professional Announcement

Messrs. SEYMOUR & MILLINGTON-HORE, solicitors, of 6 Market Place, Reading, transferred their practice on 28th March, 1951, to new offices at 27 Queen Victoria Street, Reading, where their telephone number is 3292/3.

Honours and Appointments

His Majesty The King has been pleased to approve, on the recommendation of the Lord Chancellor, the names of the following gentlemen for appointment to the rank of King's Counsel: Sir ALAN EDWARD ELLIS, K.C.B., BENTLEY HERBERT WADDY, M.C., DAVID WEITZMAN, WALKER KELLY CARTER, IFOR BOWEN LLOYD, CLAUD HUMPHREY MEREDITH WALDOCK, C.M.G., O.B.E., GEORGE POLLOCK, EDWARD LANCELOT MALLALIEU, GEOFFREY DE PAIVA VEALE, ALAN ABRAHAM MOCATTA, O.B.E., HENRY BURTON, JOHN HAROLD BASSETT, RAWDEN JOHN AFAMADO TEMPLE, JOCELYN EDWARD SALIS SIMON, JOHN ROBERTSON DUNN CRICHTON, DANIEL JAMES BRABIN, M.C.

Mr. C. O. JONES and Mr. W. E. WILLIAMS, solicitors, of Wrexham, were on 28th March admitted as Freemen of the Borough of Wrexham in recognition of their public services. The citation in the case of Mr. JONES specially mentioned his work in connection with legal aid to poor persons as Hon. Secretary of the Poor Persons Committee of the Chester and North Wales Incorporated Law Society.

The Lord Chancellor has appointed Mr. St. J. P. CHARLES, Registrar of the Swansea County Court and District Registrar in the District Registry of the High Court of Justice in Swansea, to be in addition the Registrar of Neath and Port Talbot County Court as from 2nd April, on the retirement of Mr. R. P. St. J. Charles.

The Lord Chancellor has appointed Mr. T. M. HARRIES, Registrar of the Pontypridd, Ystradyfodwg and Porth, Aberdare and Mountain Ash, and Merthyr Tydfil County Courts, and District Registrar in the District Registries of the High Court of Justice in Pontypridd and Merthyr Tydfil, to be in addition the Registrar of Bridgend County Court and District Registrar in the District Registry of the High Court of Justice in Bridgend as from 2nd April, on the retirement of Mr. R. P. St. J. Charles.

Miscellaneous

GENERAL COUNCIL OF THE BAR

ANNUAL ELECTION, 1951

PROPOSAL FORMS.—Every candidate for election must be proposed in writing, and the proposal form signed by at least six barristers, together with his signed consent to serve if elected, must be sent to the Secretary at the offices of the Council, 2 Stone Buildings, Lincoln's Inn, W.C.2, on or before Monday, 16th April, 1951. Forms are obtainable upon application.

A list of candidates duly proposed will be screened not later than 20th April, 1951.

VACANCIES.—*Twenty-four* candidates have to be elected of whom *two* at least must be of the Inner Bar, *ten* at least must be of the Outer Bar, and of these, *two* at least must be of less than ten years standing at the Bar.

VOTING.—(*a*) Every barrister is entitled to vote at the election. Voting papers together with instructions will be sent out to members of the Bar on or about 30th April, 1951.

(*b*) Any barrister who has not received a voting paper may obtain one upon his *written or personal* application to the offices of the Council, 2 Stone Buildings, Lincoln's Inn, W.C.2.

(*c*) Votes may be cast during the 14 days ending on 14th May, 1951, on which date completed voting papers must be in the hands of the Secretary.

W. W. BOULTON,
Secretary.

2 Stone Buildings,
Lincoln's Inn, W.C.2.
29th March, 1951.

The King George's Fund for Sailors, 1 Chesham Street, S.W.1, offers an opportunity of donating money to this central fund for all naval charities as a seven-year covenant. The donor promises for seven years or during his lifetime (whichever shall be the shorter period) to pay an annual sum to the Fund out of his general fund of taxed income. Another convenient method is a form of bequest which bequeaths any sum for the use of the Fund free from duty.

The next General Quarter Sessions of the Peace for the Borough of Walsall will be held at the Guildhall, Walsall, on 23rd April, at 11 a.m.

Wills and Bequests

Mr. R. C. Lindsay, solicitor, of Liverpool, left £23,944 (£23,820 net).

Mr. D. Musker, Town Clerk of Camberwell since 1938, left £13,701.

OBITUARY

MR. C. E. ATKINSON

Mr. Charles Evans Atkinson, J.P., solicitor, of Harrogate, died on 25th March, aged 86. Admitted in 1887, he was for more than thirty years Registrar of the Harrogate, Ripon and Tadcaster County Court Circuit. He had been treasurer of the Harrogate Law Society since it was formed over thirty years ago.

The Hon. JAMES GEOGHEGAN

The Hon. James Geoghegan, a judge of the Supreme Court of the Republic of Ireland until his retirement last year, has died in Dublin, aged 64. He was admitted in 1908 and was called to the Irish Bar in 1915 and to the English Bar in 1923.

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 88–90, Chancery Lane, London, W.C.2. Telephone: Holborn 1403.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).

951

n the
dence
perty
m the
nd, if
doubt
gainst
ry or
obate
by the
ulsory

untry
evers-
perty
isions

ction.
ut to

may
ces of

May,
hands

ary.

S.W.1,
nd for
omises
be the
of his
d is a
of the

rough
April,

23,820

, left

, died
e than
caster
rogate

urt of
ied in
led to

Lane,

ayable

ed by
ion).
URNAL